KANG WAH CONSTRUCTION SDN BHD

v.

CHAN AI MIN PROPERTY SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[SUIT NO: 22-03 OF 1999-III/I]
24 SEPTEMBER 1999

CIVIL PROCEDURE: *Action - Firm of advocates appointed by liquidator to represent plaintiff company under liquidation - Whether liquidator must obtain authority of court or committee of inspection for appointment - Companies Act 1965, s. 236 - Whether failure to do so rendered action incomplete*

CIVIL PROCEDURE: *Attachment - Attachment of properties, application for - Debtors Act 1957, s. 19 - Whether attachment made out on merits of case*

The plaintiff company under liquidation applied for attachment of five properties under s. 19 of the Debtors Act 1957. The Deputy Registrar dismissed the application on the ground that the firm of advocates who appeared for the plaintiff was appointed by the liquidator without the authority of the court or committee of inspection as required under s. 236(1)(e) of the Companies Act 1965 ('the Act'). Hence, the instant appeal.

Held:

[1] Although the authority to appoint an advocate was not obtained, the action was not incompetent. The defendants being third parties in so far as the plaintiff company in liquidation was concerned could not take objection that the authority of the court or the committee of inspection was not obtained.

[2] The liquidator should be allowed to bring or defend an action or other legal proceedings in the name and on behalf of the company without the prior sanction of the court or committee of inspection. To deem otherwise would lead to injustice. Where recovery of debts are concerned, the liquidator may have to appoint an advocate immediately so as to avoid running foul of the statute of limitation. In such instances, it would not be possible to apply for a sanction in time to save the cause of action.

[3] The liquidator's power to defend an action under s. 236(2)(a) of the Act includes the power to commence an action and the power to appoint an advocate for that purpose.

[4] The want of authority of the court or the committee of inspection only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs.

[5] The plaintiff had showed ample evidence of the 1st defendant's intention to dispose of its properties. The 1st defendant had disposed one out of the five properties sought to be attached. A case for attachment was made out but only in respect of one property that was about to be sold.

[6] As for the rest of the properties which were charged to the 3rd defendant, an order of attachment would not be feasible as it would have the effect of preventing the 3rd defendant from exercising its right under the charge.

[Order accordingly.]

Case(s) referred to:

Bensa Sdn Bhd (in liquidation) v. Malayan Banking Bhd & Anor [1993] 2 CLJ 68 ***(not foll)***

Dublin City Distillery v. Doherty [1914] AC 823 ***(refd)***

Ex p Brown [1886] 17 QBD 488 ***(refd)***

Maiko Woods Maritime & Properties Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd [1998] 4 MLJ 395 ***(refd)***

Selvam Holdings (M) Sdn Bhd v. Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1995] 1 AMR 139 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 236(1)(e), (2)(a), (3)

Debtors Act 1957, s. 19

Companies Act 1948 [UK], s. 245

Companies (Consolidation) Act 1908 [UK], s. 151

Other source(s) referred to:

The Companies Act, Buckley, 13 edn, p 517

For the plaintiff - Polycarp Teo Sebom; M/s Teo Sebom, Tan & Madhi
For the 1st defendant - Sheena Chuah; M/s Battenberg & Talma
For the 2nd defendant - Lim Lip Sze; M/s Reddi & Co

Reported by S Selvarajah

JUDGMENT

Ian HC Chin J:

Introduction

This is an appeal by Kang Wah Construction Sdn Bhd, which is in liquidation, against the decision of the Deputy Registrar who had on 5 August 1999

dismissed the application of the plaintiff for attachment of the properties under s. 19 of the Debtors Act. The learned Deputy Registrar dismissed the application solely on the ground that the firm of advocates, Messrs Teo Sebom, Tan Madhi, who appeared for the plaintiff company under liquidation was appointed by the liquidator without the authority of the court or committee of inspection which is required by s. 236(1)(e) of the Companies Act 1965 (the Act). This objection was taken by the defendants Chai Ai Min Property Sdn. Bhd. and Pacific Bank Berhad.

The Law

The first question that comes to mind is why should the defendants be allowed to raise such a point? Buckley on *The Companies Act*, 13 edn, p. 517 has this to say:

> The defendant to proceedings brought by the liquidator in the name of the company cannot take the objection that the sanction of the Court has not been obtained.

The case relied on as supporting that proposition of law is *Dublin City Distillery v. Doherty* [1914] AC 823 where, *inter alia*, the court considered s. 151 of the Companies (Consolidation) Act 1908 which enables a liquidator, in the case of a winding-up in Ireland, to bring or defend legal proceedings with the sanction of the court. The sanction was not obtained but the court held that the section does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that no such sanction has been obtained. In that case a plaintiff lent to a company various sums of money secured by a second series of debenture and also purportedly secured by stocks of whisky. The company had earlier issued a first series of debenture under which Cox acted to appoint a liquidator in the winding-up of the company. The assets were not sufficient to satisfy all the debenture holders of the second series of debenture and thus prompting the plaintiff to claim a right over the stock of whisky in priority over the second debentures. The claim was resisted by the liquidator. The High Court and Court of Appeal found for the plaintiff. The liquidator appealed despite leave being refused by the court. The House of Lords reversed the decision and held, *inter alia*, that leave is not a necessary preliminary but that the liquidator can always appeal at the peril, if unsuccessful, of being deprived of his costs.

Though that case dealt with the sanction for an appeal the law is no less applicable concerning the initiation of an action since it involves the interpretation of a provision dealing with obtaining sanction. Therefore, though the authority to appoint an advocate was not obtained, it does not mean that

the action is incompetent. I would also follow that decision to hold that the defendants being third parties in so far as the plaintiff company in liquidation is concerned cannot take the objection that the authority of the court or the committee of inspection has not been obtained.

That decision was notwithstanding the fact that under s. 245 of the English Companies Act 1948, the power to bring or defend any action or other legal proceeding in the name and on behalf of the company and to appoint a solicitor to assist him in the performance of his duties shall only be exercised with the sanction of either the court or the committee of inspection. Thus, in England, an action commenced by an advocate upon the instruction of a liquidator is not invalid as to justify it being struck out notwithstanding that the prior sanction of the court has not been obtained. Therefore, even less so in the case of an action commenced by an advocate instructed by a liquidator whose appointment was without the sanction of the court or the committee of inspection but which action can be commenced without the sanction of the court or the committee of inspection.

A *fortiori* in Malaysia where s. 236 of the Malaysian Companies Act 1965 allows a liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company without the need to apply for the authority of the court or committee of inspection to do so.

Such a decision stands to reason as otherwise it would work injustice. Take for instance a liquidator immediately upon assuming office discovered that a suit had to be commenced to recover a debt if it is not to be caught by the statute of limitation. In order to commence an action the liquidator would have to engage an advocate and do so immediately. To interpret the provision as requiring the sanction first or else it would be illegal would mean defeating the right of the company and the duty of the liquidator to recover the assets as it would not be possible to apply for such sanction in time to save the cause of action. Another approach which I would adopt is that taken by Abdul Aziz b Mohamad J in *Selvam Holdings (M) Sdn Bhd v. Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139 where the learned judge held that the power to defend an action under s. 236(2)(a) of the Act, which I would add the power to commence an action as well, must necessarily include the power to appoint an advocate for the purpose.

It does not follow that such an interpretation would leave the liquidator to act in any manner he likes with regard to litigation. He is still subject to the sanction of costs because though costs are normally paid out of the estate of the company but costs improperly incurred may be disallowed (*Ex parte Brown* [1886] 17 QBD 488). Furthermore, the liquidator is still subject to the control of the court under s. 236(3) of the Act which is in the following terms:

(1) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributors may apply to the Court with respect to any exercise or proposed exercise of any of the above powers.

In the course of the argument I had been referred to *Maiko Woods Maritime & Properties Sdn Bhd & Ors v. Asia Commercial Finance (M) Bhd* [1998] 4 MLJ 395 which dealt with a firm applying to represent and defend a company in liquidation but it did not exhibit the consent of the liquidator. Obviously, the power is conferred on the liquidator not on the law firm to apply for authority to appoint an advocate. The present case is not concerned with such a situation. Another case referred to is *Bensa Sdn Bhd (in liquidation) v. Malayan Banking Bhd & Anor*]1993] 2 CLJ 68; [1993] 1 MLJ 119 which considered s. 236(1)(e) and James Foong J there, at p. 126, said this:

> One further point that arose during the course of trial is the allegation that Mr Ong Ban Chai, counsel for the liquidator, had no *locus standi* in these proceedings under s. 236(1)(e) of the Act. Further, the actions of the liquidator in bringing this motion to court is void under s. 236(2) and (3) of the Act.
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> Section 236(1)(e) of the Act states as follows:
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> > The liquidator may with the authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.
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> There is no evidence of such authority granted by the court or by the committee of inspection. Mr Ong Ban Chai of course argued that though the court's permission was not obtained, the committee of inspection could grant such authority. This, to him, should be an internal affair of the company. I cannot accept this contention in the absence of any evidence to show that the committee of inspection has granted such authority. Section 236(1)(e) of the Act clearly lays down such a requirement and when challenged, proof must be tendered that such authority does exist and not just by a mere wave of the hand to dismiss it as an internal arrangement.
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> As for s. 236(2) of the Act which involves various activities of the liquidator in carrying out his duties to wind up the affairs of the company and distribute its assets, the court shall as provided by s. 236(3) of the Act have only a control over such matters. 'Control' unlike 'authority' as stated in s. 236(1) of the Act is that it can commence but subject to the approval of the court. As for 'authority', one cannot even begin to commence unless authority or permission is granted. As for this contention, I find that the acts of the liquidator in bringing this motion to court is not void under s. 236(2) and (3) of the Act but, the appointment of Ong Ban Chai as an advocate to assist the liquidator is.
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> Based on the reasons stated aforesaid, I dismissed the liquidator's motion with costs.

I would respectfully disagree with that decision for the reasons (1) the third parties Malayan Banking Bhd & Anor in that case should not be heard to say no authority was obtained (Buckley on *The Companies Act*, 13 edn, p. 517), (2) no such authority is required (*Selvam Holdings (M) Sdn Bhd v. Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor*) and (3) even assuming that the court's authority is required, the absence of such an authority does not render the action incompetent nor the advocate lacking *locus standi* since he was appointed by the liquidator and the lack of the authority of the court or committee of inspection only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs (*Dublin City Distillery v. Doherty*).

There was another alternative for the liquidator which was to apply for a blanket order from the court but though the English court had granted such an order before, it was also frowned upon since such a blanket order would render the supervisory function of the court more illusory than true.

The Merit

In so far as the defendant Chai Ai Ming Property Sdn Bhd is concerned, it did not seriously argue that an attachment should not be issued as the plaintiff had provided evidence that the said defendant is going to dispose of its properties. In fact by the time of the hearing of this appeal, the said Defendant had out of five properties sought to be attached managed to dispose of one of the properties while another was in the process of being disposed of. I am of the view that a case for attachment had been made out but only in respect of one property that was about to be sold and hence I made the following order:

> An order is made attaching the property described in Lot 736 Section 64 Kuching Town Land District provided that if the 1st Defendant shall have already entered into an agreement disposing of the property, only the proceeds of the sale shall be attached and for this purpose the 1st Defendant is ordered to pay into court within 24 hours of the receipt of the proceeds pending the disposal of the action herein. All sums deposited with the court shall be placed on fixed deposit with any financial institution in the name of the Deputy Registrar.

As for the rest of the properties, they were charged to the other defendant Pacific Bank Berhad and I am unable to see how I can issue an order which has the effect of preventing that bank from exercising its right under the charge. I therefore refused that application.